IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION TO STRIKE "DEFENDANTS' NOTICE OF ADVICE TO THE COURT" [DKT #1427]

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the "State"), and moves to strike "Defendants' Notice of Advice to the Court" [DKT #1427]. In support of this Motion, the State states:

I. Introduction

With their filing, Defendants have acted contrary to their representations to the Court, misrepresented the meet-and-confer record between the two sides, and attempted to circumvent the Court rules. First, contrary to counsel for the Tyson Defendants' representations in open court that he would submit -- if he submitted anything -- an "agreed" order on issues pertaining to the scope of the State's claims, Defendants have unilaterally submitted a "notice" asking the Court to enter an unagreed-to proposed order containing factual representations that are incomplete, out-of-context, and sometimes flat-out wrong. Second, contrary to Defendants' representations in their "notice," it was Defendants who failed to follow through on the meet-and-confer process, not the State. And third, Defendants made this filing and ask that an order

be entered without providing the State either a mechanism or time to respond. Defendants are, quite simply, pursuing tactics that would misconstrue the State's claims and cut out the State's participation in a matter that involves important issues pertaining to the State's case.[1] Defendants' conduct in connection with this "notice" has been improper and unfair in multiple respects, and accordingly, the purported "notice" must be stricken.

II. Argument

Defendants' unilateral submission of an unagreed-to proposed order is inconsistent with counsel for the Tyson Defendants' representation to the Court at the July 5, 2007 hearing:

> Mr. George: . . . I have conferred with Mr. Bullock, we don't yet have an agreement, but I hope to be able to present an agreed order with respect to memorializing some of the narrowing of those claims and I simply wanted to alert Your Honor to that process, so that if we do submit one you wouldn't be surprised by it.
> The Court: All right. Would it be helpful then for me to receive that prior to an order as to the balance?
> Mr. George: I think it might be, Your Honor. And the only hiccup there would be in the unlikely event that Mr. Bullock and I cannot agree we would simply need to notify Your Honor.
> The Court: Please.

July 5, 2007 Transcript, 102:4-16. Simply put, if the two sides were unable to agree to a stipulation as to certain issues pertaining to the scope of the State's claims, they were to notify the Court. Contrary to Defendants' representations, *see* Notice, ¶ 6, the two sides were unable to reach agreement not through any fault of the State, but rather because Defendants chose to break off discussions, failing to provide the requested citations for their inaccurate account of the State's positions relative to this issue and instead filed this "notice" with the Court. *See* Exhibit 1 (Nov. 29, 2007 e-mail from Bullock to George requesting that State be provided citations for

[1] Notably, Defendants do not contend that the "factual" findings they seek by their "notice" are before the Court at the January 9, 2008 hearing. *See* Notice, ¶ 10.

representations contained in proposed stipulation).[2] Indeed, it was not until following the filing of Defendants' "notice" that the State actually saw Defendants' citations.

Thus, the meet-and-confer process clearly was not complete when Defendants filed their "notice." Moreover, even had the meet-and-confer process run its course and the two sides failed to reach agreement, the appropriate course would have been a joint notice to the Court. Instead, Defendants have not only filed a motion masquerading as a notice, but also have attempted to deprive the State of its right to respond to the motion.

Indeed, the introduction of "Defendants' Notice of Advice to the Court" filed on December 28, 2007, states that Defendants "hereby submit the following advice to the Court regarding status of discussion with Plaintiffs [sic] concerning their standing to pursue certain claims in this action." In paragraph 8 of the "notice," however, Defendants state that "Defendants advise the Court of this unresolved issue and submit herewith their proposed Order Regarding Standing of Plaintiffs [sic]. Defendants request entry of the proposed order prior to the January 9, 2008 hearing." Defendants' filing thus plainly seeks entry of a court order and therefore it is not a notice, but rather a motion. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion") (emphasis added). Had Defendants properly brought a motion, under due process principles and pursuant to LCvR 7.2(e), the State would be entitled to 18 days to respond to the relief being sought. *See* LCvR 7.2(e). By denominating their filing a "notice," and requesting entry of its proposed order prior to the January 9, 2008 hearing, *see* Notice, ¶ 8, Defendants are apparently attempting to circumvent these procedural protections afforded the State. That Defendants would seek entry of a proposed order without affording the State a mechanism or the opportunity to respond is fundamentally unfair and improper.

[2] Exhibit 1 to Defendants' "Notice" is not a complete representation of the correspondence between the parties and does not include this e-mail.

Further underscoring the impropriety of the "notice," Defendants' filing states that they "submit herewith their proposed Order Regarding Standing of Plaintiffs [sic]." *See* Notice, ¶ 8. No proposed order, however, was contemporaneously sent to the State. Despite requesting a copy of the proposed order from Defendants on December 28, 2007, counsel for the Tyson Defendants did not send the proposed order until December 31, 2007, thereby prejudicing the State in its efforts to more promptly address the "notice." Thus, not only have Defendants sought entry of an order by an improper procedural mechanism, without providing the State the opportunity to respond, but also they have done so without even contemporaneously providing the State a copy of the order they seek to be entered. This is improper.

Compounding this string of improprieties are problems with the proposed order itself. Should the Court so desire, at the hearing on January 9, 2008, the State will explain in detail the inappropriateness and inaccuracies of Defendants' proposed order. In a nutshell, however, the proposed order is inappropriate because a number of its statements either are incomplete extracts of the State's positions or have been shorn of their necessary context. Therefore, they are inaccurate, misleading and/or subject to being misconstrued. Additionally, in some instances the statements are simply flatly inaccurate. Defendants have misconstrued the nature and scope of the State's case. Defendants' gamesmanship is obvious: they have tried to mine hearing transcripts and old briefs for isolated statements that they deem helpful and strung them together without proper context in a carefully worded "proposed order" in hopes of gaining some future strategic advantage in some yet-to-be announced tactic. Defendants' maneuver should not be condoned. There is no rule or procedure allowing a party to simply pull quotes from the opposing party's brief, fashion them into a favorable order, and then petition the Court for an entry of that order.

In sum, although it is frankly mystified by Defendants' purported "need" for a stipulation on matters pertaining to the State's clearly-pled claims in this case, the State nevertheless stands ready to continue the meet-and-confer process unilaterally abandoned by Defendants to see if some stipulation might be reached. But Defendants' gamesmanship that is reflected in this "notice" should not be tolerated by this Court.

III. Conclusion

WHEREFORE, in light of the foregoing, the State's Motion to Strike should be granted.

Respectfully submitted,

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I certify that on the 3rd day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Poultry \ Pleadings \ 01-03-08 Motion to Strike re Defendants' Notice